KIEN TAT SDN. BHD.

v.

KLOCKNER INDUSTRIE-ANLAGEN GMBH

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. D1-23-1920-87]
16 JANUARY 1989

ARBITRATION : *Appeal against decision of Senior Assistant Registrar - Order of stay of proceedings - Section 6 of Arbitration Act 1952 - Intention of parties - Different interpretation by parties - Sufficient reasons to refer.*

The defendant, by way of summons-in-chambers applied for an order to stay further proceedings of a civil suit brought by the plaintiff on the grounds that the matter of contention should be referred to arbitration as agreed to in the contract between the parties.

The defendant referred to an article in the contract between the parties wherein the intention of the parties was to refer any dispute, controversy or claim arising out of or relating to the contract to be settled by arbitration.

The summons-in-chambers was allowed but the plaintiff applied for adjournment of the matter into Court for further argument.

Held:

[1] The different interpretation placed by the parties upon the Addendum I to the contract showed that there is a difference or a controversy which arose out of the said contract and its supplement and that therefore the arbitration clause therein applied.

[2] The dispute was "in respect of a matter agreed to be referred to arbitration" within s. 6 of the Arbitration Act 1952 and "that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

[3] Order for a stay of proceedings was made and the Court confirmed the decision in chambers.

[4] Costs in the cause.

Cases referred to:

Ellerine Brothers (Pty.) Ltd. & Anor. v. Klinger [1982] 1 WLR 1375
Associated Bulk Carries Ltd. v. Koch Shipping Inc. (The "Fuohsan Maru") [1978] 1 Lloyd's LR 24
Ellis Mechanical Services Ltd. v. Wates Construction Ltd. [1978] 1 Lloyd's LR 33
KSM Insuran Bhd. v. Ong Ah Bah & Anor. [1986] 1 MLJ 237
London and North Western Railway v. Jones [1915] 2 KB 35

Legislation referred to:

Arbitration Act 1952, s. 6

For the plaintiff/respondent - Dominic Puthucheary (Chia with him); M/s. Skrine & Co.
For the defendant/appellant - C. Abraham/J. Ding; M/s. Shearn Delamore & Co.

JUDGMENT

Gunn Chit Tuan J:

The Malaysian branch of Klockner Industrie-Anlagen GmbH (the defendant) applied by way of summons-in-chambers dated 21 July 1987 for an order that all further proceedings in the

action known as Civil Suit D1-23-1920-87 by Kien Tat Sdn. Bhd. (the plaintiff) against it be stayed pursuant to s. 6 of the Arbitration Act 1952, in that the parties have an agreement in writing dated 25 May 1985 and have expressly agreed to refer to arbitration the matters in respect of which the action was brought.

In an affidavit dated 17 July 1987 affirmed by one K.A. Benckendorff, the regional director of the defendant, it was stated that the plaintiff's statement of claim related to a contract which was entered into between the parties and that there are now disputes within the purview of the contract. Reference was made to the following Art. 37 of the said contract between the parties dated 25 May 1985 wherein it was the intention of the parties to refer any dispute, controversy or claim arising out of or relating to the contract to be settled by arbitration:

37. **Settlement of Disputes**

37.1 Any dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

37.2 The appointing authority shall be the Kuala Lumpur Regional Arbitration Centre.

37.3 The number of arbitrators shall be 3 according to Art. 7 of the Rules.

37.4 The place of arbitration shall be Kuala Lumpur. The language to be used in the arbitral proceedings shall be English.

37.5 The arbitrators are bound to observe the terms of the contract. The law applicable to this contract shall be that of Switzerland.

37.6 Neither Party shall be entitled to suspend performance of the contract merely by reference of a dispute to arbitration. Even in such case of submission of a dispute to arbitration or to the technical expert, any suspension or termination shall remain governed by the provisions of the contract.

37.7 In case of arbitration proceedings arising between the employer and the buyer, the contractor shall support the employer in all respects concerning the contractor's duties and obligations out of this contract. The contractor shall be given full opportunity by the employer to present its views, evidence, experts and witnesses in the proceedings between the buyer and the employer.

Any arbitration award rendered between the buyer and the employer shall be binding upon the contractor as far as the contractor's duties and obligations are concerned, provided the contractor had been given full opportunity to present his position as aforesaid.

It was also averred that the parties had entered into the following supplementary agreement known as Addendum I wherein it was mutually agreed that a sum of RM3,000,000 would be transferred to the defendant but not as a loan as pleaded by the plaintiff in its statement of claim:

Addendum I

to the contract made on 25 May in the year Nineteen hundred and eightyfive ... By and between.

Klockner Industrie Anlagen Gmbh, Malaysian Branch, Erection Department, WDT 50, Sipitang, Sabah/East Malaysia

hereinafter called "employer"

And Kien Tat Sdn. Berhad,
21, Jalan Dua,
Off Jalan Chan Sow Lin,
Kuala Lumpur/
West Malaysia

hereinafter called the "contractor"

Witnesseth: that the employer and contractor for the considerations set forth herein undertake and agree as follows on 10 September 1986.

It has been agreed that for compensation of the Extra Cost incurred by the contractor as laid-down in letter KTSH/SA/649/YKL hjl dated 18 July 1986 the employer will pay to the contractor after "Mechanical Completion Acceptance" the sum of MYR5,310,000 in addition to the evaluated and certified contract price.

The employer is prepared to pre-finance the contractor's expenditures at Site up-to an amount according to enClause 1 to this Addendum 1 to the contract for the period September 1986 to January 1987.

Due to the fact that the employer has already in the past pre-financed the contractor's expenditures, the employer will have to return the performance guarantee issued by Kwong Yik Bank, Kuala Lumpur, in order to release the contractor's deposit of MYR3,000,000. Representatives of both the contractor and the employer will exchange the bank guarantee against the deposit of MYR3,080,000. Out of this sum contractor and employer will, mutually transfer MYR3,000,000 to the employer's account in West Germany. This transaction shall take place by the end of September 1986 or before expiration of the bank guarantee at the latest. The warranty guarantee requirement as per Clause 33.1.4(c) of the General Conditions of the contract is hereby deleted.

Eventual balance between the contract plus MYR5,310,000 as para. 1 above and the payments already made to or on behalf of the contractor shall be settled by the contractor.

The contractual Key Date Schedule shall be revised in accordance with enClause 2 to this Addendum I to the contract.

All other conditions of the contract remain unchanged.

It was further averred that it was the intention of the plaintiff to refer the matter to arbitration as evidenced by the following letter from the plaintiff's former solicitors:

Lim Kean Siew & Co.,
Advocates & Solicitors.
Suite 2105-A, 2nd Floor,
Wisma Hamzah Kwong Hing,
1-Leboh Ampang,
50100 Kuala Lumpur
Telephone No. 2304023.

22 January 1987.

Our Ref KK/KT-KIA/L(D)/87/1401.

Klockner Industrie-Anlagen GMBH
Erection Department,
WDT 50,
39850 Sipitang,
Sabah.

Dear Sirs

Re: Sabah Pulp & Paper Mill

We are in receipt of your letter dated 14 January 1987. Our clients deny that they were the ones who broke off negotiations with you.

While we are in the process of making preparations to refer our clients' dispute with you for arbitration at the Kuala Lumpur Regional Arbitration Centre our clients shall be ever ready to resume negotiations with a view to seek an amicable solution. However due to the deterioration of good-will between our clients and you we suggest that all future negotiations, if any, be in the presence of a mediator acceptable to both sides. If you are still keen on resuming negotiations we would suggest as a mediator any of the following persons:

i) Tan Sri Chang Min Tat, a retired Judge of the Supreme Court of Malaysia.

ii) Mr. Louis Cheah, a member of the Bar Council in Malaysia;

iii) Mr Graham Moffatt, a practising architect well versed in arbitration matters.

Perhaps you may wish to nominate any other suitable person.

cc. KEDC
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Sieluff.

There was also the following joint application for arbitration which the parties have signed:

To: The Director
Regional Centre for Arbitration
576 Jalan Taming Sari
50480 Kuala Lumpur.

Joint Application for Arbitration.

We, the undersigned, are parties to an agreement dated 25 May 1985, and, by Art. 37, we have agreed as follows:

37.1 Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

37.2 The appointing authority shall be the Kuala Lumpur Regional Arbitration Centre.

37.3 The number of arbitrators shall be 3 according to Art. 7 of the Rules.

37.4 The place of arbitration shall be Kuala Lumpur. The language to be used in the arbitral proceedings shall be in English.

37.5 The arbitrators are bound to observe the terms of the contract. The law applicable to this contract shall be that of Switzerland.

We, the signatories to the said agreement, hereby wish to inform you that we are in dispute with each other on several matters, including the validity of the termination, and, as agreed, we hereby apply for the arbitration of the dispute.

Dated this day of 1987.

Sgd. Kien Tat Sdn. Bhd.

Sgd. Klockner Industrie Anlagen Gmbh.

After hearing the arguments of both Counsel in my chambers on 23 March 1988, and having considered the affidavits and exhibits filed, I allowed the appeal against the decision of the

learned Senior Assistant Registrar and made an order for stay of all further proceedings pursuant to s. 6 of the Arbitration Act 1952.

Being dissatisfied with my said order in chambers the plaintiff's Counsel applied on 24 March 1988 for an adjournment of the matter into Court for further arguments. I allowed the application and heard further arguments on 2 December 1988. Counsel for the defendant pointed out that under Art. 8 of the said contract entered into between the parties on 25 May 1985, the plaintiff was contractually bound to provide a performance bond in favour of the defendant. The bond was a form of security to ensure that the plaintiff carried out its obligations properly. According to the said supplementary agreement called Addendum I the defendant was to return the performance bond in order to allow the plaintiff to be released by the guarantor of a sum of RM3,080,000 deposited with the latter.

The defendant would then be without any security to ensure that the plaintiff carried out its work regularly, diligently and properly. Therefore it was also provided in Addendum I that the plaintiff would transfer to the defendant's account in West Germany the sum of RM3,000,000. Counsel also pointed out that it was further stated in Addendum I that "all other conditions of the contract remain unchanged." He contended that that showed that the said Addendum I was clearly meant to supplement and be part of the said contract signed by both parties. He further contended that although the performance bond was provided to secure due performance by the plaintiff of its obligations, that requirement could be altered by the parties by agreeing that instead of a performance bond the plaintiff would pay to the defendant a specific sum of money as security for the due performance of the plaintiff's obligations under the said contract. It was the contention of the Counsel that the issue of the release of the RM3,000,000 deposit was connected directly with the said contract, and it was submitted that by reason of the surrounding circumstances the transfer of the RM3,000,000 to the defendant's account was not a loan as alleged by the plaintiff, but was instead a form of security for the due performance of its obligations. A different interpretation placed by the parties upon the said Addendum I to the contract showed that there is a difference or a controversy which arose out of the said contract and its supplement and that therefore the arbitration clause therein applied.

Counsel then referred to the UK Court of appeal case of *Ellerine Brothers (Pty). Ltd. & Anor. v. Klinger* [1982] 1 WLR 1375, 1376. In that case there was an agreement made in 1978 which provided for the appointment of the defendant as the principal distributor of a film financed by the plaintiffs, and contained an undertaking by the defendant to account to the plaintiffs for the net receipts of the film. The agreement required all disputes arising between the parties to be referred to arbitration. The plaintiffs received no statements of account from the defendant, despite a number of requests, and in 1981 they issued a writ claiming an account of the net receipts of the film and an order for payment by the defendant of all moneys found due on such account. The defendant applied for a stay of the proceedings pending arbitration pursuant to s. 1(1) of the UK Arbitration Act 1975. The Judge held that the plaintiffs' proceedings were "in respect of a matter agreed to be referred" to arbitration and that there was a "dispute between the parties with regard to the matter agreed to be referred" as provided by s. 1(1) and that, accordingly, the Court had to grant a stay of proceedings. On appeal by the plaintiffs, the UK Court of Appeal held, dismissing the appeal, that the defendant was entitled to have the proceedings stayed under s. 1(1) of the UK Arbitration Act 1975 if the proceedings involved a matter on which agreement had not been reached and which fell fairly and squarely within the terms of the arbitration clause; that the claim for not only an account but for the payment of moneys found due on the taking of an account showed that at the time the writ was issued there was a dispute between the parties

and, since the defendant had never accepted that he was under an obligation to provide an account or to pay anything, there was at all material times a dispute between the parties which had under the agreement to be referred to arbitration.

Counsel then submitted that as in the *Ellerine Brothers'* case the dispute here between the parties fell within the arbitration clause in this case.

Counsel also referred to the case of *Associated Bulk Carriers Ltd. v. Koch Shipping Inc (The "Fuohsan Maru")* [1978] 1 Lloyd's LR 24. In that case the shipowners had let their vessel *Fuohsan Maru* on a time charter to the charterers for five years from delivery at a hire rate of RM2.59 per ton dead weight per month. The vessel was delivered on 29 August 1974, and the redelivery date was therefore 29 July 1979, at the earliest. The charter provided, *inter alia*, that any or all differences and disputes of whatsoever nature arising out of the charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.

The charterers duly operated the vessel and paid the hire regularly but in December 1976, the tanker market had slumped and the rate for *Fuohsan Maru* had fallen from RM2.59 to a little over RM1. The charterers "manufactured" claims for the purpose of avoiding payment of the hire. Subsequently in 1977 the shipowners treated the charterers' conduct as a repudiation and held them liable for all loss and damage arising therefrom. The shipowners then issued a writ against the charterers claiming damages for wrongful repudiation of the charter and also applied for summary judgment under RSC O. 14, but the charterers applied by summons for a stay of the action under the UK Arbitration Act 1975. It was held by Kerr J that there was a dispute in respect of "a matter agreed to be referred" within s. 1 of the said Arbitration Act 1975, and that the charterers were entitled to a stay. On appeal by the shipowners it was held by the UK Court of Appeal (Browne and Geoffrey Lane LJJ, Lord Denning MR dissenting) that (1) in that case it was plain that the shipowners were entitled to heavy damages for breach of contract but there was no quantified sum; and although the charterers had admitted liability, the whole claim for damages was in issue; and on the facts of the case it could not be said that any definable or quantified part of the claim was not in dispute and it was impossible to identify or quantify any particular part of the claim in respect of which there was no defence or which was undisputably due. It was also held that the learned Judge was right in holding that he could not possibly conclude that there was no dispute in respect of the matter agreed to be referred; the matter agreed to be referred was any dispute under the charter-party and there was a dispute as to the shipowners' quantum of damages; and under s. 1 of the Arbitration Act 1975, the Court had, in this case, no choice but to grant the stay. The appeal was dismissed.

Counsel submitted that in this case although the RM3,000,000 is identifiable, yet the issue was whether that sum is now payable to the plaintiff. He submitted that the nature of the transaction involving the transfer of the said RM3,000,000 was in dispute and pointed out that the said Addendum I did not refer to the said sum as a loan.

Datuk Dominic Puthucheary, the leading Counsel for the plaintiff, submitted that the money in this case was released as a loan. He referred to para. 3 of an affidavit affirmed by one Lee Lok Chye, a director of the plaintiff company, in which it was averred that the defendant was justly indebted to the plaintiff for a sum of RM3,000,000 being loan advanced to the defendant by the plaintiff. But Counsel conceded that Addendum I did not describe the RM3,000,000 as a loan and after referring to the following passage in the judgment of Lord Denning MR in *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.* [1978] 1 Lloyd's LR 33:

> There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the Court sees that there is a sum which is indisputably due, then the Court can give judgment for that sum and let the rest go to arbitration, as indeed the Master did here.

contended that summary judgment be given in respect of the RM3,000,000. He then referred to the said affidavit of K.A. Benckendorff and contended that it did not show any reason why the RM3,000,000 was transferred to the defendant. He also referred to the judgment of George, J In *KSM Insuran Bhd. v. Ong Ah Bah & Anor.* [1986] 1 MLJ 237, 238 in which the learned Judge said that invoking the arbitration clause did not provide the 1st defendant with a defence in that he had not shown that there had been any dispute or difference between the plaintiff and him. He had not contended that the amount claimed against him was in fact not owing. The learned Judge in that case referred to *London and North Western Railway v. Jones* [1915] 2 KB 35 in which case Rowlatt J had said that "Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation."

With respect, I considered that the above quoted dictum of Lord Denning MR must be carefully read and considered. It will be noticed that his Lordship considered that summary judgment could be given for a sum which appears to be **indisputably due** and to refer the balance to arbitration. But the sum in this case, although quantified and identifiable, is not indisputably due as the claim of the plaintiff is disputed by the defendant.

Again, with respect, I considered that the case of *KSM Insuran Bhd. v. Ong Ah Bah & Anor*. (*supra*) is distinguishable because here unlike the first defendant in that case, the defendant has shown that there is in fact a dispute or controversy between the parties and has contended that the amount claimed was not a loan as alleged by the plaintiff. Or to put it in another way, using the words of Rowlatt J in *London & North Western Railway v. Jones* (*supra*) the claim of the plaintiff in this case is **really disputed** and therefore gives rise to a 'dispute' calling the arbitration clause into operation. After hearing the further arguments of both Counsel, I still considered that the said Addendum I, which forms part of the said contract of 25 May 1985, must be read together with it. The reason for the transfer of the RM3,000,000 referred to in the said Addendum I is not therefore an independent issue. The dispute or controversy, regarding the transfer of the RM3,000,000 in accordance with a clause in the said Addendum I is therefore a dispute or claim which arose out of or was related to the contract as envisaged in its Art. 37. It is a dispute "in respect of a matter agreed to be referred to arbitration" within s. 6 of the Arbitration Act 1952. In the circumstances of the case I was satisfied, to use the words of the Legislature again in s. 6 of the Arbitration Act 1952, "that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement" and therefore made the order for a stay of proceedings. On 2 December 1988, I therefore confirmed my decision in chambers dated 23 March 1988 and also ordered that costs be in the cause.

Also found at [1989] 2 CLJ 172